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The Right to Counsel and Due Process in Probation Revocation Proceedings: Gagnon v. Scarpelli

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Recommended Citation

Case Comment, The Right to Counsel and Due Process in Probation Revocation Proceedings: Gagnon v. Scarpelli. 23 Clev. St. L. Rev. 151 (1974)

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*The Right to Counsel and Due Process
In Probation Revocation Proceedings:
Gagnon v. Scarpelli*

ON MAY 14, 1973, THE WORST FEAR of at least one commentator was borne out¹ by the opinion of the Supreme Court in *Gagnon v. Scarpelli*.² Justice Powell, writing for the Court, recognized certain due process rights of the individual who has been convicted and placed on probation. The Court refused to adopt a per se right to representation by counsel as an element of due process in probation revocation proceedings, however. The opinion has left the meaning and importance of due process in grave doubt, has retarded the progression of penal-correctional reform, and has insured a heavy docket for an already overburdened appellate system by a return to the unworkable rule formulated in *Betts v. Brady*.³

The factual history of the case began when Gerald H. Scarpelli was convicted of armed robbery in the state of Wisconsin, sentenced to fifteen years of imprisonment, and subsequently placed on probation for a period of seven years. Under a "Parole Agreement and a Travel Permit and Agreement to Return," Scarpelli was allowed to return to his home in Illinois where he was arrested the following month for burglary. Based on an unsigned confession, allegedly made under duress, his probation was summarily revoked without a hearing or the benefit of counsel. He had not been prosecuted for the alleged burglary, and the voluntariness of the confession was never determined by a court of law.⁴ After retaining counsel, Mr. Scarpelli appealed the revocation of his probation.

The Federal District Court in Wisconsin held that the lack of a hearing prior to probation revocation was a violation of due process. More importantly, it found that substantial rights were involved at such hearings and that the assistance of counsel was required.⁵ In concluding that counsel was necessary, the court followed numerous

¹ See Ruben, *The Burger Court and the Penal System*, 8 CRIM. L. BULL. 31, 40 (1972). Sol Ruben here warned that the effects and likely result of the Burger Court's review of correctional law cases would be adverse to reform.

² *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *rev'g* 454 F.2d 416 (7th Cir. 1971).

³ 316 U.S. 455 (1942).

⁴ *Scarpelli v. Gagnon*, 317 F.Supp. 72 (E.D. Wisc. 1970).

⁵ *Id.* at 76.

decisions⁶ which had allowed an expansive interpretation of the right to counsel in probation revocation proceedings under *Mempa v. Rhay*.⁷ The reasoning behind the District Court's opinion was undoubtedly the "fair play" doctrine of due process and equal protection as afforded by the fourteenth amendment. The undisputed point was that "... substantial rights of the probationer are involved at a probation revocation hearing. The probationer's liberty hinges on the outcome of the hearing."⁸

The decision of the District Court was affirmed on appeal.⁹ In elaborating on the reasoning of the lower court, Judge Fairchild found that the question of whether the assistance of counsel at the revocation proceeding is necessary, turns on the function which counsel is to serve.¹⁰ The Court of Appeals determined, as had the Supreme Court in the analogous decisions of *Goldberg v. Kelly*¹¹ and *In re Gault*,¹² that the right to be heard would be of little avail if it did not comprehend the right to be heard through counsel.¹³

In reversing the Court of Appeals, the majority of the Supreme Court adopted a different viewpoint. Following the reasoning of Justice Powell in his concurrence in *Argersinger v. Hamlin*,¹⁴ the majority confined to its narrowest sense the earlier opinion in *Mempa v. Rhay*.¹⁵ In addition to the limitation of *Mempa* as to the necessity of counsel at a deferred sentencing, a valuable note of the court explains that the opinion to follow would apply equally to parole and probation revocation proceedings.¹⁶

⁶ See *Annot.*, 44 A.L.R.3d 306. Courts in Florida, North Carolina, Oklahoma, Texas, and Wisconsin have specifically refused to follow the narrow interpretation of *Mempa v. Rhay*, 389 U.S. 128 (1967), that counsel need be appointed only if the revocation proceedings were also a deferred sentencing proceeding. Illinois, Massachusetts, New Mexico, New York, Ohio, and Oregon had provision for counsel at such hearings whether sentencing had been imposed or not, but did not necessarily appoint counsel per se. See also *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *Scarpelli v. Gagnon*, 317 F.Supp. 72 (E.D. Wisc. 1972); *Gargan v. State*, 217 So.2d 578 (Fla. App. 1969); *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970); *In re Callyar*, 476 P.2d 354 (Okla. Crim. 1970); *Ex Parte Bird*, 457 S.W.2d 559 (Tex. 1970); *Ex Parte Fuller*, 435 S.W.2d 515 (Tex. 1969).

⁷ 389 U.S. 128 (1967). The Court in *Mempa* allowed for appointment of counsel at revocation proceedings only when sentence had not been passed, in accordance with Washington State statutes on sentencing.

⁸ *Scarpelli v. Gagnon*, 317 F.Supp. 72, 77 (E.D. Wisc. 1970).

⁹ *Scarpelli v. Gagnon*, 454 F.2d 416 (7th Cir. 1971).

¹⁰ *Id.* at 422.

¹¹ 397 U.S. 254 (1970).

¹² 387 U.S. 1 (1967).

¹³ See *Powell v. Alabama*, 287 U.S. 45 (1932), where this philosophy concerning the right to counsel had its original inception.

¹⁴ 407 U.S. 25 (1972).

¹⁵ 389 U.S. 128 (1967).

¹⁶ *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). See generally 120 U. PA. L. REV. 287 (1972).

The decision initially, and with few reasons given, finds that there is a right to due process in revocation proceedings which includes the right to both a preliminary and final revocation hearing,¹⁷ in accordance with *Morrissey v. Brewer*.¹⁸ The opinion then shifts to the right-to-counsel question, and centers on the Court's concept of the duties, attitude, and functions of the probation or parole officer. The majority had determined that the role of these officers is to help determine the welfare of their clients and at the same time meet a primary duty to protect the public. The duty of these officers is the supervision of rehabilitation, and thus revocation is a last resort to be used only when treatment fails. In further discussion of the role of the officer, the Court demonstrates a concern for the officer's neutral status. To insure that a probationer or parolee not have his freedom unjustifiably taken away, it is necessary that the officer not be forced into a prosecutorial role.¹⁹

It would seem that the Court's opinion rests upon extremely frail grounds. The "major" authority in support of the majority opinion in the area of probation, is a casebook on the administration of criminal justice.²⁰ In addition, the Court recognized, but seemed unconcerned with, the lack of vitality which attaches to the due process rights of the accused when counsel is not present.²¹ The primary force behind the acceptance of such an egregious attitude was the firm belief that most probation-parole violations occur as the result of the commission of another crime.²² A recent study would seem to indicate that this basic assumption is unfounded.²³

The Court gives various reasons for the denial of a per se right to counsel, among which are the costs that would be imposed upon the criminal justice system and various collateral disadvantages which would hinder the operation of the revocation proceedings. It recognizes that the case-by-case approach, which it had adopted for a

¹⁷ *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

¹⁸ 408 U.S. 471 (1972). These due process rights give the probationer a right to have the initial hearing held as near as possible to the locality where the probation violation has occurred. The Court in *Gagnon* realizes this procedure will necessitate a modification of the Interstate Compact. *Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 (1973). The due process rights afforded in *Morrissey*, and extended here, are listed by the Court as those of notice, opportunity to appear and present evidence, a conditional right (in the interests of safety of informers) to confront adverse witnesses, an independent hearing body, and a written report of the decision made. *Id.* at 786. The final hearing includes these same rudiments of due process but is less summary in that it considers revocation rather than the preliminary issue of probable cause for such; see Cohen, *A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616 (1972).

¹⁹ *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973).

²⁰ *Id.* at n. 7 & 8 (REMINGTON, NEWMAN, KIMBALL & GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION: MATERIALS & CASES 910-11 (1969)).

²¹ *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973).

²² *Id.* at n. 10.

²³ FINAL REPORT OF THE OHIO CITIZENS TASK FORCE ON CORRECTIONS E6 (1971).

determination of the necessity of counsel, will cause problems; but holds that since revocation proceedings are not part of the criminal prosecution, they do not invoke the full protection of the sixth amendment.²⁴ In concluding, the opinion sets forth the following test to determine when counsel is necessary: When the probationer-parolee makes a good faith request to the court, and when there are complexities in the hearing that a layman would be unable to cope with, counsel must be provided. The final paragraph of the opinion recognizes that there are such complexities in granting the writ of habeas corpus, and strongly suggests that Scarpelli be furnished counsel.²⁵ The basis for the decision is that the probation-parole revocation proceeding is not part of the criminal trial,²⁶ and therefore does not require the same high degree of protection afforded to juveniles,²⁷ or others within the criminal process.²⁸

General Analysis: The Sixth Amendment

The fact that the Court devoted the first one-third of its opinion to an explanation and justification of the *Morrissey* and *Mempa* decisions gives insight into the reasoning and negative impact which flow from the *Gagnon* decision. The effect of this portion of the opinion was to make an unconvincing differentiation between probation revocation hearings and the criminal prosecution, thus avoiding certain constitutional guaranties. After eliminating the petitioner's sixth amendment argument, the Court then focused its unsympathetic view on the elements of due process.

Of further disconcert is the summary fashion in which it decided that revocation proceedings are not part of the criminal sentencing process which requires the appointment of counsel.²⁹ The sixth amendment approach would seem to be the most logical reasoning for the Court to have followed for several reasons. First, probation itself should be seen as an alternate sentencing process; once imposed, it reflects the opinion of the sentencing judge that probation will be the best means of rehabilitation for the individual and best serve society's desires. Any prison sentence imposed by the court at the time of granting probation should be looked upon as a means of coercion to insure compliance with society's goals as they pertain to

²⁴ *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973).

²⁵ *Id.* at 791.

²⁶ *Id.* at 790.

²⁷ *Id.* at n. 12; *In re Gault*, 387 U.S. 1 (1967).

²⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973).

²⁹ See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: PROBATION, 3, 21, 25, §1.1 (1970) [hereinafter cited as ABA STANDARDS: PROBATION]. This study recommends that the revocation process be an independent sentencing process within the criminal action, and that retained or appointed counsel be allowed (at §5.4).

the probation-parole status. The major obstacle to accepting the separate sentencing theory, however, is the need to accept the modern goal of penology as the reintegration and rehabilitation of the offender. Strangely enough, the Court here accepted the second premise,³⁰ but failed to logically follow with the acceptance of the first. It would seem that if probation or parole is to further the accepted goals of rehabilitation and reintegration, then it must be assumed that revocation of an individual's status would occur only as the result of the failure of the enumerated goals.³¹ Such failure should be unquestionable and total; these goals are certainly beyond recognition where the individual is placed in a penal institution.³² In light of the reasoning for revocation, such proceedings should entail a full hearing within the criminal process to determine if a failure of the stated goals has in fact occurred, and if so, to impose a new sentence which would attempt to promote rehabilitation and reintegration. In espousing these methods to best utilize the sentencing process, it is accepted that revocation of probation-parole is often a means of retribution enforced against the individual for his failure to conform with meaningless and absurd rules which have little if anything to do with the penal-correctional process.³³

A second theory under which the right to counsel should attach is that developed under the "loss of liberty" concept, discussed later in this Comment. The basic contention in the "loss of liberty" theory is that any time a person's liberty is in jeopardy, even if it be conditional liberty, all rudiments of due process which attach to the criminal trial should attach to such other proceeding. The presence of counsel at trial is to insure, among other things, that a person is not subjected to the loss of liberty without due process of law. Therefore, the actual importance and necessity for counsel arises in the probation-parole revocation proceedings just as in the criminal trial itself.³⁴

The American Bar Association has specifically recommended that the judiciary be free of handcuffs which allow little discretion on its

³⁰ *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973), where this theory is accepted by the Court. See also ABA STANDARDS: PROBATION 1-2.

³¹ ABA STANDARDS: PROBATION §5.1.

³² See Benzanson & Sigler, *Role Perception Among New Jersey Probation Officers*, 2 RUT.-CAM. L.J. 251 (1970); ABA STANDARDS: PROBATION 67; Klockors, *A Theory of Probation Supervision*, 63 J. CRIM. L.C. & P.S. 550 (1970); PRESIDENT'S TASK FORCE REPORT: CORRECTIONS, CH. 3, PROBATION 27 (1967).

³³ See FINAL REPORT OF THE OHIO CITIZENS TASK FORCE ON CORRECTIONS E6 (1971), which indicated that approximately 50% of recommitted parolees in Ohio were recommitted for technical violations, not for new crimes; this is in direct conflict with the assumptions of the *Gagnon* Court, n. 10. See generally Bass, *Comment: Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L.C. & P.S. 979 (1969).

³⁴ See *Menechino v. Oswald*, 430 F.2d 403, 415 (1970) (Feinberg, J., dissenting).

part in imposing and enforcing a sentence, technically imposed at trial.³⁵ The A.B.A. would provide a revocation hearing which would essentially be an extension of the sentencing process. This proceeding would impose a burden of proof upon the state to determine a violation in fact, grant the judge discretion to impose a sentence other than the one previously imposed, and of paramount importance, grant a per se right to counsel under the sixth amendment.³⁶ The *Gagnon* Court did not see the issue in this perspective in their summary approach to the sixth amendment, and although they recognized the *Chewning v. Cunningham*³⁷ "critical stage" of the criminal process approach, they ignored the historical events which had required the decision in *Gideon v. Wainwright*.³⁸ The realization is plain that *Gideon* could have been decided on due process grounds, avoiding the equal protection and sixth amendment questions; but the Court in *Gideon* took notice of the number of appeals it was receiving on this issue, the number of states already providing counsel, and the injustice that too often occurred when counsel was not present.³⁹

Further support for the per se appointment of counsel in revocation proceedings is provided by the decision in *Townsend v. Burke*,⁴⁰ where a state prisoner's writ of habeas corpus was granted in the interest of "fair play" because there was an absence of counsel during sentencing. By analogy, Kadish believes that this illustration of the critical nature of sentencing should apply to the revocation proceeding, as an extension of the sentencing stage of the criminal proceeding.⁴¹ The failure of the Court to make such an extension is extremely disappointing in light of its reluctance to fully scrutinize the penal-correctional field.⁴² The decision is in direct opposition to its demonstrated concern for the protection of the constitutional rights of the accused⁴³ in the areas of pre-trial⁴⁴ and sentencing.⁴⁵

³⁵ ABA STANDARDS: PROBATION, §§1.1(f), 5.5, n. 66.

³⁶ *Id.* at 66-69.

³⁷ *Chewning v. Cunningham*, 368 U.S. 443 (1962).

³⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁹ See A. LEWIS, *GIDEON'S TRUMPET* (1964).

⁴⁰ *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

⁴¹ Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

⁴² See e.g., *Comment: The Parole System*, 120 U. PA. L. REV. 282, 339 (1971).

⁴³ See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Griffin v. California*, 380 U.S. 609 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁴ See *Coleman v. Alabama*, 399 U.S. 1 (1970); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁵ *Specht v. Patterson*, 386 U.S. 605 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948). See also *Comment: The Parole System*, 120 U. PA. L. REV. 282, 339 (1971).

Due Process

Since the Court refused to adopt the sixth amendment right-to-counsel approach, its recognition of certain due process rights and the value of these rights to the unrepresented probationer/parolee, makes the opinion all the more unconvincing. The opinion openly recognized that:

Despite the informal nature of the proceeding and the absence of technical rules of procedure or evidence, the unskilled probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.⁴⁶

Why the Court should feel that these problems are not always present at a revocation proceeding, and what the true rationale behind its denial of a *per se* right to counsel may be, are only speculative. The conclusion that due process is not so rigid as to sacrifice informality, flexibility, and economy,⁴⁷ revives thirty years of problems by presenting the probation/parole revocation process with a return to the unworkable *Betts v. Brady*,⁴⁸ case-by-case or "unusual circumstances"⁴⁹ test to determine when counsel is required at a revocation proceeding.⁵⁰

In retrospect, it is unfortunate that the Court in *Morrissey*⁵¹ did not reach the question of whether a parolee was entitled to retained counsel. This would have been a logical step after reaffirming the concept that the constitutional right to due process does not turn on whether a governmental benefit is characterized as a "right" or a "privilege".⁵² *Gagnon*⁵³ followed the same path of purblind caution in the failure to fully grasp and cope with the issue of the right to retained counsel.⁵⁴ If in fact a probationer has certain due process rights, regardless of the sentence posture, the logical corollary would seem to uphold the right to retained counsel. While the Court does not absolutely refuse to deal with the retained counsel question, it avoids the due process questions it raises by finding the subject not in issue.⁵⁵

⁴⁶ *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973).

⁴⁷ *Id.* at 787.

⁴⁸ 316 U.S. 455 (1942).

⁴⁹ *Id.*

⁵⁰ *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

⁵¹ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

⁵² *Id.* at 475.

⁵³ *Id.* at 476; see *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

⁵⁴ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

⁵⁵ *Id.* at 784 & n. 6.

⁵⁶ *Id.*

The Court's approach to the right to counsel question is one which avoids an in-depth analysis of sixth amendment rights,⁵⁷ while at the same time ignoring numerous cases which deal with important due process aspects of the case.⁵⁸ It also ignored the impact of the "critical stage of the proceedings" test which resulted from such recent decisions as *Escobedo*,⁵⁹ *Miranda*,⁶⁰ and *Townsend*.⁶¹

The Role of Probation

An aspect of the opinion which merits analysis, in that it would seem to have a great bearing on the Court's philosophy, is the need which the Court found to protect the relationship of the probation officer and the probationer. Apparently, the Court's concern with this relationship was interwoven with an idealistic view as to how the probation/parole system operates. It evidently assumed that the pronounced goals of the probation operations had been achieved within the system today. Unfortunately, this is an anachronistic view. It makes little, if any, difference to this analysis whether present probation/parole personnel are seen as sincere men doing a difficult job, or are viewed in a much less favorable light.⁶² The emphasis should be on the fact that such officers are not lawyers and that the presence of an attorney at the revocation proceedings would insure the rights of the probationer.⁶³

Professors Sigler and Benzanson, in a study of role perception among probation officers,⁶⁴ concluded that the officer is not primarily interested in the welfare and rehabilitation of the client, but only that probation be and remain an economical substitute for incarceration.⁶⁵ In response to a portion of their study they found that only 24% of the officers surveyed saw themselves as social or correctional social workers,⁶⁶ that the officer is primarily concerned with retaining

⁵⁷ See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁸ See, e.g., *Goldberg v. Kelly*, 379 U.S. 254 (1970); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

⁵⁹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁶⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966). See also *United States v. Wade*, 388 U.S. 218 (1967).

⁶¹ *Townsend v. Burke*, 334 U.S. 736 (1948).

⁶² See *Menechino v. Oswald*, 430 F.2d 403 at n. 12 and 13 (2d Cir. 1970) citing *Jackson, The Parole Board*, 69 LIFE, July 10, 1970, at 54 and GAYLIN, IN THE SERVICE OF THEIR COUNTRY, WAR RESISTERS IN PRISON, 332-42 (1970).

⁶³ See Kadish, *The Advocate and the Expert Counsel in the Penitentiary Process*, 45 MINN. L. REV. 803, 829-830 (1961); PRESIDENT'S TASK FORCE REPORT: PROBATION 27, 28-37 (1967).

⁶⁴ Sigler & Benzanson, *Role Perception Among New Jersey Probation Officers*, 2 RUT.-CAM. L.J. 251 (1970).

⁶⁵ *Id.* at 263.

⁶⁶ *Id.* at 257.

his job status,⁶⁷ and that less than 35% of the probation officer's time is allocated to interviewing his clients. The percentage of time spent in interviewing is especially relevant when considering that the mean caseload of those interviewed was ninety-six probationers,⁶⁸ considerably above the maximum of thirty recommended by the President's Task Force Report.⁶⁹ The problems which develop in the probation/parole field due to large case loads are not unique to this New Jersey sample: 67% of all felony probations during 1965 were found to be supervised by personnel with case loads of over one hundred individuals.⁷⁰ Knowledge of the complications of large case loads, coupled with the individual attitudes of probation officers, the often absurd and nonsensical rules and restrictions placed on the probationer,⁷¹ and the unproven effects of the probation process,⁷² leave one with the impression that the *Gagnon*⁷³ Court did little in-depth research into this complicated field, and placed unwarranted reliance on a certain few lawyers.⁷⁴ Apparent in its further analysis of the probation officer's position, is the fear of the Court to thrust the officer into the role of a prosecutor. This is an unrealistic view in that the probation officer has already been placed in such a role. It is invariably the officer's report and recommendation which determine the outcome of a revocation hearing. The officer's role would in no way be compromised by appointment of counsel and the initiation of an adversary process. The assumptions of the Court regarding the role of probation officers would seem to be merely that — assumptions which are unfounded in the real world.⁷⁵

All of the reasons given by the Court to justify their opinion that providing counsel would impose direct costs, alter the nature of the proceeding, endanger the good will of hearing bodies, and prolong the hearing process,⁷⁶ are equally weak arguments which will be discussed more fully.⁷⁷ The culmination of the opinion rests in a "boiler plate" test for use in the lower courts so that they may know when to pro-

⁶⁷ *Id.*

⁶⁸ *Id.* at 262.

⁶⁹ PRESIDENT'S TASK FORCE REPORT: PROBATION 29 (1967).

⁷⁰ *Id.* at 30.

⁷¹ Klockers, *A Theory of Probation Supervision*, 63 J. CRIM. L.C. & P.S. 550, 550-57, 554 (1972).

⁷² See Vasoli, *Some Reflections on Measuring Probation Outcome*, 31 FED. PROB. 24 (1967).

⁷³ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

⁷⁴ *Id.* at 789.

⁷⁵ See e.g., Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

⁷⁶ *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973).

⁷⁷ See *The Court's Rationale*, *infra* at text accompanying notes 129-137. See also PROCEEDINGS OF THE 89TH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION, WORKSHOP V. COMMITTEE ON PAROLE BOARD PROBLEMS 83 (1959).

vide counsel. The test is of the same nature as that espoused in *Betts v. Brady*,⁷⁸ and will prove to be as unworkable as that test.⁷⁹ An overview of *Gagnon* would indicate that the decision is one made not on the merits, but rather that it is the culmination of the Court's pressure to weaken the representation of offenders generally.⁸⁰

The Opinion

Perhaps the most interesting aspect of the *Gagnon* opinion is that it is an eight-to-one decision by a Court which has often divided five to four in the decision of criminal law matters.⁸¹ The only dissenter, Justice Douglas, devoted a mere four lines to an opinion based upon the facts of *Gagnon* and due process.⁸² He referred the reader to his concurrence and dissent in *Morrissey v. Brewer*⁸³ where he stated that "the parolee should be entitled to counsel,"⁸⁴ but there left his emphasis to a footnote⁸⁵. Although the reader can but speculate as to the reason for the lack of a vigorous dissent, perhaps the Court actually felt that it had insured due process in the probation or parole revocation proceeding.

The reasoning of the Court in this decision is interesting in its similarity to that of Justice Powell's concurrence in *Argersinger*,⁸⁶ decided one year earlier. In *Argersinger*, Justice Powell had called for principles of fairness (due process) rather than the per se right to counsel where one is faced with a possible deprivation of liberty as adopted by the majority.⁸⁷ Such principles of fairness would have required an exercise of discretion by the lower courts for the appointment of counsel in accordance with due process requirements,⁸⁸ a

⁷⁸ 316 U.S. 455 (1942).

⁷⁹ See text accompanying notes 96-102, *infra*.

⁸⁰ See Chief Justice Burger's speech to the American Law Institute, criticizing overzealous lawyers, NEW YORK TIMES, May 19, 1971.

⁸¹ This reflects this author's empirical research of criminal law decisions of the Burger Court. The majority of the Court in these cases consists of Burger, C.J., joined by Rehnquist, White, Blackmun, and Powell, JJ.; while the minority, led by Douglas, J., consists of Brennan, Stewart, and Marshall, JJ. Examples of this division of the Court on criminal cases from April 24 to June 25, 1973, follow: *United States v. Russell*, 411 U.S. 423 (1973); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *Miller v. California*, ____ U.S. ____, 93, S.Ct. 2607 (1973); *Paris Adult Theatre v. Slaton*, ____ U.S. ____, 93 S.Ct. 2628 (1973); *Kaplan v. California*, ____ U.S. ____, 93 S.Ct. 2680 (1973); *United States v. 12,200 ft. Reels of Super 8mm Film*, ____ U.S. ____, 93 S.Ct. 2665 (1973); *Gilligan v. Morgan*, ____ U.S. ____, 93 S.Ct. 2440 (1973); *Heller v. New York*, ____ U.S. ____, 93 S.Ct. 2789 (1973); *Roaden v. Kentucky*, ____ U.S. ____, 93 S.Ct. 2796 (1973).

⁸² *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

⁸³ 408 U.S. 471, 498 (1972).

⁸⁴ *Id.*

⁸⁵ *Id.* at 500.

⁸⁶ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁸⁷ *Id.* at 37.

⁸⁸ *Id.* at 38.

return to the *Betts v. Brady*⁸⁹ "special circumstances" rule,⁹⁰ and a similar three-pronged test for use by the lower courts.⁹¹ The only discernible rationale for the shift of the majority of the Court to Justice Powell's point of view is that the Court has finally determined the fine line between those rights which are necessary, and those rights which are *fundamentally* necessary, as distinguished in the *Betts*⁹² and *Gideon*⁹³ decisions. In the latter, a per se right to counsel was necessary to insure the protection of a fundamental right. The *Gagnon* decision has evidently disparaged the sixth amendment right to counsel as forewarned by *Kirby v. Illinois*,⁹⁴ but sooner than commentators had predicted.⁹⁵

The *Betts v. Brady* Approach

The return to the ineffectual rule⁹⁶ earlier set forth in *Betts v. Brady*⁹⁷ is a troubling aspect of the *Gagnon* decision. The opinion contains no reasoning which would lead the reader to believe that the case-by-case determination of "special circumstances" which require the appointment of counsel would be more effective today than it was ten years ago. The appellate courts must eventually evaluate the special circumstances of each case to determine which circumstances will invoke the due process right to counsel. This is an especially troubling thought when the Supreme Court, through its Chief Justice and its opinions, has attempted to curb the number of appeals being taken.⁹⁸ The increase in litigation which must of necessity arise from this decision is apparent by reviewing the test provided for the lower courts.⁹⁹

It would seem that a prerequisite to the application of the Court's test for a determination of the necessity of counsel is that the probationer or parolee must first be informed of his right to request the

⁸⁹ 316 U.S. 455 (1942).

⁹⁰ *Argersinger v. Hamlin*, 407 U.S. 25, 45 (1972).

⁹¹ *Id.*

⁹² *Betts v. Brady*, 316 U.S. 455 (1942).

⁹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹⁴ 406 U.S. 682 (1972).

⁹⁵ See 22 CLEV. ST. L. REV. 367, 372 (1973). See also *Bute v. Illinois*, 333 U.S. 640, 682 (1948) (Douglas, J. dissenting).

⁹⁶ Text accompanying notes 47-50, *supra*; between 1950 and 1963 the Court could find cases where "special circumstances" were not found. Harlan stated that, "In truth, the *Betts v. Brady* rule is no longer a reality." See generally Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962). Note that Kamisar's article is most interesting in that it was written on the eve of the *Gideon* decision and right after the decision in *Chewning v. Cunningham*, 368 U.S. 443 (1952), a case which many felt left *Betts v. Brady* with little, if any, vitality.

⁹⁷ 316 U.S. 455 (1942).

⁹⁸ See *Schnecko v. Bustamante*, 412 U.S. 218 (1973).
⁹⁹ *Gagnon v. Scarpetti*, 411 U.S. 778, 791 (1973).

assistance of counsel. It is doubtful that such information will be provided by the court where *Gagnon* affords only a contingent right to counsel. Where the accused is advised of such a right, his request must be based on a:

. . . timely and colorable claim . . . that he has not committed the alleged violations . . . or . . . that there are substantial reasons which justified or mitigated the violations . . . and that the reasons are complex or otherwise difficult to develop or present.¹⁰⁰

It would seem that every person, whether represented by counsel or not, would assert these claims. The courts have recognized that the latter portion of this test is nearly always applicable to the criminal proceeding.

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and the knowledge adequately to prepare his defense (or mitigation), even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction (or loss of freedom) because he does not know how to establish his innocence.¹⁰¹

The probable outcome is that the actual use and benefit of his right to request counsel will go the same route as those various due process rights extended in *Morrissey*. It will exist on paper but will not be administered with the same diligence as it would be to the individual who stands before the court with an attorney.¹⁰²

The Due Process Approach

The most provocative aspect of *Gagnon* is its effect upon the meaning of the fourteenth amendment due process clause. Generally we may say that due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings.¹⁰³ Yet due process requires more than mere fair play.¹⁰⁴ It requires that the Court have the wisdom to insure that the empirically correct decision prevails. The criminal justice system, the United States Constitution, and the high ideals of the American sys-

¹⁰⁰ *Id.*

¹⁰¹ *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *accord*, *Chandler v. Fretag*, 348 U.S. 3 (1954).

¹⁰² *See Cohen, A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616, 616-22 (1972).

¹⁰³ *In re Tucker*, 5 Cal.3d 171, 486 P.2d 657, 95 Cal.Rptr. 761 (1971).

¹⁰⁴ *See Townsend v. Burke*, 334 U.S. 736 (1948); *Menechino v. Oswald*, 430 F.2d 403 (1970).

tem demand that justice be administered without regard to race, creed, status, wealth, or history — but rather solely on the basis of what is right.

Though the Court faced the reality that many of the due process rights afforded in *Morrissey* would be meaningless without the benefit of counsel, it had apparently determined that it had proceeded far enough in the protection of constitutional rights.¹⁰⁵ The Court has evidently found that the elusive boundaries of due process are determinable, and have no remaining elasticity; the result is a preservation of the status quo.

Though the elements of due process may vary with the type and nature of the proceeding, and a probation revocation proceeding may be characterized as non-criminal to avoid the sixth amendment, there is little doubt that the requirements of due process apply to this adjudicative proceeding.¹⁰⁶ The essence of due process affords protection of the individual from arbitrary action at the revocation proceedings.¹⁰⁷ The derogation of due process in *Gagnon* is determined by the treatment of revocation proceedings in the same manner as other proceedings where imprisonment is not at stake.¹⁰⁸ Arbitrariness in the revocation of probation or parole has consequences which are much more severe upon the individual than arbitrariness in the termination of a civil status, however. To prevent the arbitrary incarceration of an individual, logic would seemingly require the assistance of counsel.

It is interesting to compare *Gagnon's* failure to extend a per se right to counsel under a due process approach with other recent decisions of the Court involving due process and right to counsel. In many judicial, quasi-judicial, and administrative areas of the adjudicatory process, the protection of due process rights necessarily include the right to be represented by counsel. The most notable decision was *Goldberg v. Kelly*¹⁰⁹ which rejected any distinction between the characterization of a right or a privilege in the determination of whether to apply due process. In rejecting this distinction, the Supreme Court found that the termination of welfare benefits required a hearing at which the indigent party was entitled to representation by counsel.¹¹⁰ Certain state courts have followed this approach, ex-

¹⁰⁵ See *Scarpelli v. Gagnon*, 454 F.2d 416 (7th Cir. 1971).

¹⁰⁶ *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

¹⁰⁷ *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 302 (1937).

¹⁰⁸ See *Goldberg v. Kelly*, 379 U.S. 254 (1970); *Sherbet v. Verner*, 374 U.S. 398 (1963); *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963).

¹⁰⁹ 379 U.S. 254 (1970).

¹¹⁰ *Id.* at 270.

tending the right to counsel under due process requirements to parole revocation proceedings.¹¹¹ In New York, Chief Justice Flud in the *Menechino*¹¹² case determined that the federal Constitution demands that counsel be provided in revocation proceedings.¹¹³ He reasoned that the purpose of counsel was merely to afford added protection to the accused and to assure that all pertinent facts were before the hearing body, to assure an accurate determination as to whether or not there should be a revocation.¹¹⁴

The most compelling outline of the necessity of counsel in any proceeding where liberty is at stake, and one as viable today as it was over forty years ago, is that in *Powell v. Alabama*.

What then does a hearing include? Historically and in practice in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel.

* * *

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore, of due process in the constitutional sense.¹¹⁵

The right to appointed counsel for indigents under both the sixth and fourteenth amendment provisions has developed over this forty-year period.¹¹⁶ Disregarding, for the moment, the question of appointed counsel, it seems apparent that *Powell v. Alabama* and various state decisions would recognize that a right to retained counsel does exist.¹¹⁷

¹¹¹ See *Warden v. Palumbo*, 214 Md. 407, 135 A.2d 439 (1957); *Menechino v. Warden*, 27 N.Y.2d 376, 318 N.Y.S.2d 449 (1971); *Commonwealth v. Tinson*, 433 Pa. 328, 249 A.2d 549 (1969).

¹¹² 27 N.Y.2d 376, 267 N.E.2d 238, 319 N.Y.S.2d 449 (1971).

¹¹³ See also *Combs v. LaVallee*, 29 App.Div.2d 128, 286 N.Y.S.2d 600, *appeal dismissed*, 22 N.Y.2d 857, 293 N.Y.S.2d 117 (1968), where the right to counsel had previously been extended in revocation proceedings under the due process clause of the 14th amendment of the New York State Constitution.

¹¹⁴ *Menechino v. Warden*, 27 N.Y.2d 376, 318 N.Y.S.2d 449, 455 (1971).

¹¹⁵ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

¹¹⁶ *Goldberg v. Kelly*, 379 U.S. 254 (1970); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹¹⁷ See *Annot.*, 44 A.L.R.3d 306. Cases cited note 6 *supra*. The following states have held that there is a right to counsel where, as in *Mempa v. Rhay*, 389 U.S. 128 (1967) sentence remains to be imposed; most also recognizing the right to retained counsel: Ala., Ariz., Cal., Colo., Fla., La., Me., Md., Mass., Mich., Mont., Neb., N.J., N.Y., N.D., Ohio, Ore., Pa., R.I., Tex., Wash., W.Va., & Wisc. See *eg.*, *Winchester v. State*, 45 Ala.App. 24, 221 So.2d 700, (1969); *State v. Walter*, 12 Ariz. App. 282, 469 P.2d 848, (1970); *State v. Miller*, 19 Ohio St.2d 180, 249 N.E.2d 920 (1969); *In re Collyar*, 476 P.2d 354 (Okla., 1970); *Ex parte Bird*, 457 S.W.2d 559 (Tex. 1970). See also MODEL PENAL CODE, §301.4 which recommends that counsel be required in probation revocation proceedings.

The right to retained counsel is further supported by the decisions in *Chandler v. Fretag*¹¹⁸ and *Ferguson v. Georgia*¹¹⁹ where the courts determined that regardless of whether the petitioner would have been entitled to the appointment of counsel, his right to be heard through retained counsel was unqualified.¹²⁰ It is interesting to note that these cases reaffirmed *Powell*, which was supposedly overruled by *Betts*,¹²¹ in a fashion that completely ignored the *Betts* decision. It is possible that *Gagnon* will meet the same end.

Equal Protection Problems

The logical corollary to the right to retained counsel is an argument for the equal protection of indigents through the appointment of counsel.¹²² The equal protection problems raised by the Court's decisions, while conveniently abandoned, were essential to the issues presented. "[T]he presence of counsel in some cases when it is denied in others gives rise to equal protection problems."¹²³ This aspect of the decision will no doubt be heavily litigated in the immediate future where thirty-seven of fifty-four jurisdictions already permit the presence of retained counsel at parole revocation hearings.¹²⁴

The very basis of equal protection lies in the thesis that each man will stand equal before the law, without regard to the stage of the proceeding. The concept that a probation revocation proceeding is not criminal in nature where sentence has previously been imposed, thus avoiding sixth amendment and due process rights,¹²⁵ is inconsistent with previous case law.¹²⁶ It would appear to be a weak rationalization for a predrawn conclusion. The Court, while relying on fine distinctions, avoided the clear reality that the loss of personal liberty is at stake in every revocation proceeding.¹²⁷ Kamisar and Choper have

¹¹⁸ 348 U.S. 3 (1954).

¹¹⁹ 365 U.S. 570 (1961).

¹²⁰ *Chandler v. Fretag*, 348 U.S. 3 (1954). See also TASK FORCE REPORT: CORRECTIONS, *supra* note 23, at 86.

¹²¹ 316 U.S. 455 (1942).

¹²² 372 U.S. 335 (1963).

¹²³ *Perry v. Williard*, 427 P.2d 1020, 1024 (Ore. 1967); see *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). Though a right to appeal may not necessarily be constitutionally protected, if such a right does exist, equal protection demands that it be as accessible to the indigent as it is to the more affluent, thus in scope answering the very question avoided in *Gagnon*.

¹²⁴ O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651 (1973). The 37 jurisdictions allowing retained counsel are: U.S. Board of Parole, Ala., Alas., Ariz., Ark., Del., D.C., Fla., Ga., Hawaii, Idaho, Ill., Iowa, Md., Mich., Mo., Neb., Nev., N.H., N.Y., N.C., N.D., Okla., Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wisc., & Wyo. See also Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964). Sklar demonstrates the changes from pre-Mempa law.

¹²⁵ See *Mempa v. Rhay*, 389 U.S. 128 (1967).

¹²⁶ See *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967).

¹²⁷ See ABA STANDARDS: PROBATION, §§1.1, 1.3.

most adequately stated the correct approach to revocation proceedings. "[A] decision on the continued liberty of an individual should be made judically, in light of all relevant factual data, and with adequate procedural safeguards."¹²⁸

The Court's Rationale

The most sincere justification for the opinion would seem to be the Court's statement that the provision of counsel would impose "direct costs and serious collateral disadvantages"¹²⁹ on the revocation process. The majority concluded that the right to counsel would alter the nature of the proceedings, that the hearing body would become akin to a judge, and that the process would be prolonged.¹³⁰ In making such determinations, the Court failed to demonstrate that the proceedings are not already adjudicatory in nature. In fact, it would seem that the hearing does entail receiving evidence, that the hearing body does have the power to incarcerate the defendant, and many other powers essential to a trial judge. The final determination is limited to the issue of incarceration or freedom of the accused, however. Placing such a premium on the "collateral disadvantages" to the revocation process is a derogation of due process. As Judge Celebrezze of the Sixth Circuit Court of Appeals has asserted: "neither the nature of the governmental function nor fear of disruption of that function can justify the denial of [due process]."¹³¹ In making the preceding statement, Judge Celebrezze was concerned not only with arbitrary and capricious action by revocation authorities, but with the insight that such authorities too often acted without hearing all of the pertinent evidence.¹³²

It would plainly seem that the assistance of counsel is necessary to insure that the accused be given a fair hearing. The fears as to the cost of appointed counsel¹³³ have been shown to be groundless.¹³⁴ The

¹²⁸ Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1 (1963).

¹²⁹ *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

¹³⁰ *Id.*

¹³¹ *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968) (Celebrezze, J. dissenting).

¹³² *Id.* at 104.

¹³³ Kadish, *supra* note 41 at 838-39. In Michigan, even though the right to counsel in revocation proceedings has existed since 1937, none of the "calamities" seen by the Court in *Gagnon* have yet to occur there. Maryland has had similar positive results in its proceedings which also allow for the presence of counsel.

¹³⁴ See ADMINISTRATION OF THE UNITED STATES COURTS, 1966 ANNUAL REPORT 128. The cost of supervising a person on probation for one day was 67¢ compared to the cost of imprisonment for one day, \$7.54. This disregards the added benefits of the probationer's income, avoidance of governmental support for his family, and the imposition of the prison stigma. This demonstrates, assuming that a like dollar-to-cents ration exists today, that

(Continued on next page)

Miranda,¹³⁵ *Escobedo*,¹³⁶ and other decisions which displayed a concern for individual rights were not founded in fear of costs to the justice system, but designed to insure the ultimate reliability of the sentencing process.¹³⁷

In failing to follow the reasoning of the *Gideon* decision "that the layman defendant is not able to adequately protect his fundamental rights . . ." ¹³⁸ the Court ignored precedent which demonstrates an identical need for the protection of a probationer-parolee's rights.¹³⁹ It has failed to realize that the probationer/parolee, like the juvenile, requires the protection afforded by counsel in order to "cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense, and to prepare and submit it."¹⁴⁰ Perhaps the only *raison d'être* for *Gagnon* lies in the rationalization that constitutional due process and equal protection rights do not fully apply once a person's guilt has been determined.¹⁴¹

The Proper Perspective

In formulating change in the penal-correctional process, it is necessary to consider the injustice which results from the deprivation

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monetary costs of appointing counsel could be balanced against the money saved in insuring that only those who need be incarcerated are in fact incarcerated. *See also* the OHIO TASK FORCE REPORT cited note 23, *supra*, which would indicate that nearly 50% of those whose parole was revoked might not have been re-incarcerated if counsel had been present.

¹³⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³⁶ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹³⁷ Our system of justice has been built on the adage that it is better for several guilty persons to go free, than for one innocent person to have his liberty denied. The essence of this adage has been the assurance that persons accused of wrongdoings have been afforded various protective rights, lumped under the heading of due process. It would seem to be axiomatic that these same due process rights should be afforded when liberty is at stake in the revocation process.

¹³⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see* 18 U. KANSAS L.R. 686 (1970).

¹³⁹ *See Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946). The defendant's parole was revoked at a parole hearing because the defendant left the District of Columbia without written permission from his parole board. It appears that the defendant misunderstood the exact conditions of his parole. He did not obtain permission to leave the District, but this permission was obtained from his parole sponsor who had no authority to give such permission. However, these facts were not adequately presented at the parole hearing because the defendant was not allowed to be represented by counsel or to present witnesses. In *Moore v. Reid*, 246 F.2d 654 (D.C. Cir. 1957), the defendant's parole was also revoked as a result of certain misunderstandings. The *Moore* court felt that if the defendant had been allowed to be represented by counsel that these misunderstandings might not have occurred. These two cases and the *Turner* revocation hearing indicate the benefit that may be had from right to counsel in a probation revocation hearing. For a discussion of *Turner*, *see infra*, at text accompanying notes 156-159.

¹⁴⁰ *In re Gault* 387 U.S. 1 (1967). *See generally*, 12 WAYNE L. REV. 638 (1966).

¹⁴¹ The problem with this approach is that *Douglas v. California*, 372 U.S. 353 (1963), and *Griffin v. Illinois*, 351 U.S. 12 (1956), do not agree with the equal protection theory. This matter was not taken up by the *Gagnon* Court.

¹⁴² *See Ruben, The Burger Court and the Penal System*, 8 CRIM. L. BULL. 31 (1972).

of a right to counsel¹⁴² in light of the necessity for probation. Probation is designed to promote the rehabilitation¹⁴³ and reintegration of an offender as a productive member of society.¹⁴⁴ The commitment to the theory is evident in the statistics compiled by the President's Commission on Law Enforcement and the Administration of Justice's Task Force Report of 1967.¹⁴⁵

The first practice of probation began prior to 1850 in Massachusetts,¹⁴⁶ with the enactment of a modern procedure of probation.¹⁴⁷ Originally classified as a matter of grace and not of right,¹⁴⁸ no constitutional rights attached to a grant of probation.¹⁴⁹ In *Escoe v. Zerbst*,¹⁵⁰ Justice Cardozo's dicta insured the extension of such views and overshadowed those seemingly more enlightened aspects of the opinion which recognized the validity of certain constitutional rights.

The *Mempa* decision in 1967 required that counsel be provided for the offender where sentence had not yet been passed.¹⁵¹ The aftermath of *Mempa* found a majority of states following the requirements set forth by the Court,¹⁵² with a minority extending a right to counsel to all revocation proceedings regardless of the sentence posture.¹⁵³ While the status of the right to counsel in the revocation proceeding remained uncertain and presented no uniform rule,¹⁵⁴ the common thread was the notion of insuring the application of due process of law.¹⁵⁵

Perhaps the powers exercised by a revocation authority, and the possible abuses that may occur without the presence of counsel, can best be illustrated by an analysis of *People v. Turner*.¹⁵⁶ In *Turner*, the

¹⁴³ *Burns v. United States*, 287 U.S. 216, 220 (1932); *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945).

¹⁴⁴ ABA STANDARDS: PROBATION 1.1(a), at 1, 2, 22.

¹⁴⁵ TASK FORCE REPORT: CORRECTIONS, *supra* note 23, at 202.

¹⁴⁶ E. SUTHERLAND, PRINCIPALS OF CRIMINOLOGY 383 (1947).

¹⁴⁷ MASS. ANN. LAWS, ch. 276, §83 (1955).

¹⁴⁸ *Burns v. United States*, 287 U.S. 216 (1932).

¹⁴⁹ *Escoe v. Zerbst*, 295 U.S. 490 (1935).

¹⁵⁰ *Id.*

¹⁵¹ *Mempa v. Rhay*, 389 U.S. 125 (1967).

¹⁵² See Annot., 44 A.L.R.3d 306, 315.

¹⁵³ *Id.* at 321-27.

¹⁵⁴ See generally *U.S. ex rel Bey v. State Board*, 443 F.2d 1079 (2d Cir. 1971); *People v. Burrell*, 334 Ill. App. 253, 79 N.E.2d 528 (1960); *Williams v. Commonwealth*, 350 Mass. 732, 216 N.E.2d 779 (1966); *Blea v. Cox*, 75 N.M. 265, 403 P.2d 701 (1965); *People v. Warden*, 27 N.Y.2d 376, 318 N.Y.S.2d 449 (1971); *Perry v. Williard*, 247 Ore. 145, 427 P.2d 1020 (1967). Note that Ohio and various other jurisdictions have held that an accused is entitled to counsel and appointment in certain instances, but have expressly held there is no *per se* right to such. Compare *Thomas v. Maxwell*, 175 Ohio St. 233, 193 N.E.2d 150 (1963) with *State v. Nowak*, 91 Ohio App. 401, 108 N.E.2d 377, *app. denied*, 157 Ohio St. 525, 106 N.E.2d 82 (1952).

¹⁵⁵ See ABA STANDARDS: PROBATION, Parts I and IV.

¹⁵⁶ 27 App.Div.2d 141, 276 N.Y.S.2d 409 (1967).

probationer had been convicted of the attempted sale of narcotics and placed on probation upon the condition that he go to a hospital under the care of a Dr. Burnett. The probationer obeyed the court's instructions but left the hospital the next day, immediately reporting to probation supervision. Four months later the probationer was arrested, charged with violating probation in leaving the hospital, and at a hearing held by the original trial judge found guilty of the breach.

The essence of the finding by the court was that the probationer's case history, and the reports of his probation officer, showed that he "demonstrated a sincere, cooperative, and mature attitude regarding the conditions of probation imposed and [there were] no reports of misconduct or the use of narcotics . . ." ¹⁵⁷ Other evidence at the revocation proceedings showed that probationer, a negro, may have been arrested because he was seeing a white girl. Fortunately the case was reversed on appeal. But when one questions due process and the right to counsel in this area of the law, let him ask where this probationer would have been without the aid of the attorney he was able to retain. This is an area where dangers of abuse are real and full procedural safeguards are appropriate. ¹⁵⁸ The fact that probation is not a matter of right does not justify the termination of probation by methods which are patently unfair. ¹⁵⁹

Probation must not be viewed as a quasi-judicial or administrative area of the law. In its proper perspective it is a real and viable part of the criminal law system. ¹⁶⁰ The basic need for the acceptance of this reality lies in the fact that probation revocation should serve a constructive purpose. A plan should be formulated in the best interests of the probationer, his family, and the community which will facilitate and promote rehabilitation. ¹⁶¹ Little is gained when the court makes its disposition for the sake of punishment only. ¹⁶² The need for such a perspective is based upon the reasoning that:

The right to personal liberty is one of the most sacred and valuable rights of a citizen and should not be regarded lightly. The right to personal liberty may be as valuable to one convicted of crime as to one not so convicted, and . . . he may not be deprived of the same [without due process of law]. ¹⁶³

¹⁵⁷ *Id.* at 145, 276 N.Y.S.2d at 412 (1967).

¹⁵⁸ See FINAL REPORT OF THE OHIO CITIZENS TASK FORCE ON CORRECTIONS (1971). Technical violations account for approximately 50% of parole revocations.

¹⁵⁹ MODEL PENAL CODE §301.4, comment; see Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

¹⁶⁰ Comment: *Discretionary Power and Procedural Rights in Granting & Revoking Probation*, 60 J.CRIM. L.C. & P.S. 479, 483 (1969).

¹⁶¹ See ABA STANDARDS: PROBATION §§1.1, 1.2, 1.3.

¹⁶² DiCerba, *When Should Probation be Revoked?* 30 FED. PROBATION 2:11, 14 (1966).

¹⁶³ *State v. Zolantakis*, 70 Utah 296, 259 P. 1044, 1046 (1927).

Thus it would seem that the value of legal representation in protecting the freedom of an individual is as critical to one who has been placed on probation as it is to one who has not yet received a definite sentence.¹⁶⁴

Two further disadvantages of the revocation process as it presently exists are the vast discretion given to the revocation authority and the widespread policy of revocation based on a new violation for which the probationer is never tried.¹⁶⁵ The latter practice seems to contradict the proposition that a person is innocent until proven guilty. It further interferes with basic rehabilitative goals and aspects of fundamental fairness by sending a person to prison without establishing that he has committed a crime.¹⁶⁶

A means of halting the automatic conviction may lie in the application of a collateral estoppel doctrine similar to that applied in *Ashe v. Swenson*;¹⁶⁷ such an approach is not without precedent.¹⁶⁸ But in order to be effective, such an approach would require that the probationer be given a trial on any subsequent charge and that the result of that trial would be collateral estoppel as to identical issues at a revocation hearing. Thus, if an individual were determined innocent at a trial, there may be no need for a revocation hearing. If there were such a hearing, the revocation could not be based on the charges for which the probationer had been acquitted.

Though discretion of a judge is an accepted part of our judicial system, it has been subject to the control and guidance of precedent, written opinions, rules of procedure and evidence, statutory mandate, and an appellate process. In a revocation proceeding, held without formal proceedings or guidelines, and without benefit of counsel, it is inevitable that arbitrary and unreasonable decisions will be made. It is unfortunate that such discretion exists, for the importance of the hearing is as great as that in the original sentencing and there is the same need for an informed decision.¹⁶⁹ The probationers or parolees

¹⁶⁴ *United States v. Connecticut Bd. of Parole*, 443 F.2d 1079 (2d Cir. 1971); *California v. Youngs*, 23 Cal. App. 3d 180, 99 Cal.Rptr. 901 (1972) (dictum).

¹⁶⁵ See 30 FED. PROB. 2:11.

¹⁶⁶ See, e.g., Thompson, *Effective Advocacy in a Probation Revocation Hearing*, PRACT. LAW 3:69 (1971).

¹⁶⁷ *Ashe v. Swenson*, 97 U.S. 436 (1970).

¹⁶⁸ *State v. Sullivan*, 127 S.C. 197, 198, 212 S.E. 47, 50-51 (1923) (dissent); *State v. Renew*, 136 S.C. 302, 132 S.E. 613, 614 (1926). Judge Cotham used the collateral estoppel doctrine to point out the necessity of trying a probation violator on the new charge in order to determine if in fact there had been a violation predicated on the alleged act.

¹⁶⁹ See Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEX. L. REV. 1, 28 (1968).

who are subject to what could be an arbitrary loss of freedom without adequate procedural safeguards gain little respect for the revocation process. It is a difficult blow to those who have already demonstrated an inability to cope with society.¹⁷⁰

The reasons and necessity for the presence of counsel may be pursued ad infinitum. As previously discussed, the basic goal is that of fairness. The right to be represented by counsel is basic to our system of justice, whether the proceeding be civil,¹⁷¹ criminal,¹⁷² or administrative in nature.¹⁷³ The legal system can no longer afford to allow the probation/parole systems to fashion and enforce their own processes,¹⁷⁴ if those processes adversely affect the criminal justice system.

Douglas C. Jenkins†

¹⁷⁰ See generally 60 J. CRIM. L.C. & P.S. 479, 485-89 (1969).

¹⁷¹ *In re Gault*, 387 U.S. 1 (1967).

¹⁷² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁷³ Administrative Procedure Act, §6(a), 60 Stat. 237, (1946), APA Rev., §555(b).

¹⁷⁴ See Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rbay*, 47 TEX. L. REV. 1, 9 (1968).

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